SOME ASPECTS OF THE PRINCIPLES OF SENTENCING

by

KUNNA MANI SINNIAH

A Project Paper submitted in partial fulfilment of the requirements for the Degree of Bachelor of Laws in the Faculty of Law

Faculty of Law
University of Malaya
Kuala Lumpur

September 1975

PERAKUAN KEIZINAN

Dalam mengemukakan Kertas Projek ini bagi memenuhi sebahagian dari kehendak-kehendak Peraturan untuk mendapat ijazah Sarjana Muda Undang-Undang, Universiti Malaya, maka saya, yang bertandatangan di bawah, dengan ini mengesahkan bahawa saya telah bersetuju supaya perpustakaan-perpustakaan di Universiti Malaya memberi kebenaran dengan bebasnya kepada sesiapa yang hendak membuat rujukan dan kajian atau pun untuk rujukan dan kajian terhad. Seterusnya, saya juga bersetuju bahawasanya kebenaran untuk menyalin, memadan, menyedut atau menggunakan bahan-bahan kajian dalam Kertas Projek ini untuk maksud-maksud akademik bolehlah dibenarkan oleh Dekan, Fakulti Undang-Undang mengikut budibicaranya. Adalah difahamkan bahawa penyalinan atau pencitakan Kertas Projek ini dalam apa jua bentuk sekalipun untuk maksud-maksud keuntungan tidaklah dibenarkan, melainkan dengan kebenaran bertulis dari saya.

.....
Kunna Mani Sinniah.

Fakulti Undang-Undang,
Universiti Malaya

Oktober, 1975.

ACKNOWLEDGEMENTS

I am greatly indebted to the many people who assisted me in the course of preparing this paper, especially to the staff of the lower courts Kuala Lumpur and Petaling Jaya, the staff of the High Court Kuala Lumpur and the Attorney General's chambers, who made it possible for me to have access to the original reports of the various cases and documents which I have used in my study.

I am also greatly indebted to the magistrates of the lower court, Kuala Lumpur, Mr. Nadarajah, Mr. Walter Abraham and Enche Senawi bin Zainuddin, Madame Harwanth Kaur of the Petaling Jaya magistrates court, and ex-President, Enche Abdul Rashid bin Abdul Manaf, who had granted me an interview with them.

PREFACE

Sentencing is certainly not an aspect of criminal law and justice that is peculiar and of interest to the courts alone. In fact it is one aspect of the law which has attracted not only the courts, but also the criminologists, administrators, politicians, and the public at large.

Sentencing, is itself a wide topic and in this paper, it is proposed to look at certain aspects of sentencing. This paper will not delve into the pros and cons of the various theories of punishment, for this can be obtained from any book on sentencing, nor will it deal in depth about the various penal measures. What is proposed to be done is a study of the actual practise of sentencing - the aims and policies behind sentencing, the criteria which influence and guide the Malaysian sentencers in assessning sentence, and the way our courts view the various categories of offences that come before it.

TABLE OF CONTENTS

		Page
Preface		i
Acknowledgements		ii
List of cases		v
List of abbreviations		vii
Introduction		viii
Chapter		
I	The law and the kinds of punishments administered in Malaya from the time of the Malacca Sultanate till the adoption of the Penal Code	1
	A. The law and punishment before the period of the Malacca Sultanate	1
	B. The Malacca Sultanate and the laws on punishment	2
	C. Punishment during the Portuguese and Dutch period	5
	D. The kinds of punishment meted out in England and America during the 15th, 16th and 17th centuries	9
	E. The reception of English law and the adoption of the Penal Code	11
	F. The Criminal Justice Ordinance and the provisions relating thereto	15
II	Sentencing: The aims and policies	19
	A. General theories of punishment	19
	B. Punishment likely to vary with the moral criterion of the individual sentencer	22

Page

C. Some common offences in Malaysia. How the courts view these offences. The penal philosophy in sentencing in our courts 25

III Criteria used in assessing sentence 40

A. Statutory factor 40

B. Other legal factors 42

IV Forms of Punishment 53

A. Youthful Offenders 53

B. Adult Offenders 56

V Conclusion and Assessment 68

A. Punishment, the courts emphasis on retribution and deterrence 68

B. Some suggestions on the forms of punishment and others 70

Bibliography 76

LIST OF CASES

1. Patesegamani v pp; Federal Court Criminal Appeal No. 9 of 1970.
2. Abu Bakar v pp (1953) M.L.J. p.56
3. Tayalam v pp; Selangor Criminal Appeal No. 31 of 1972.
4. pp v Ahmad; Arrest case No. 3241 of 1972, Sessions Court, Kuala Lumpur.
5. pp v Tan Eng Hock (1970) 2.M.L.J. p.70
6. pp v Mohd. Ismail; Selangor Criminal Appeal No. 150 of 1973
7. Abdul Rahim v Zab; Criminal Appeal No. 3 of 1975
8. Maimunch v pp; Selangor Criminal Appeal No. 104 of 1974.
9. Liew Yew Siang; Selangor Criminal Appeal No. 121 of 1972.
10. pp v Teoh Hooi Leong; Criminal Appeal No. 40 of 1975.
11. pp v Ismail Loyok (1958) M.L.J. p.223
12. Goh Leng Sai (1959) M.L.J. p. 121
13. Ng Kook Jooi (1974) 2. M.L.J. p.150
14. R v Teo Cheng Lian (1949) M.L.J.
15. Ng Chong Tuck v pp; 2. Malayan Cases p.229
16. Mohammed Taufik v pp (1975) 1. M.L.J. p.36
17. Mahesan v pp (1970) 2. M.L.J. p.74
18. Lieu Chiew Seng; Selangor Criminal Appeal No. 13 of 1969.
19. Wong Sai Ngou; Criminal Appeal No. 28 of 1970
20. Harcharan Singh v pp; Selangor Criminal Appeal No. 15 of 1969.
21. pp v Abdul Bachik; Selangor Arrest Case No. 1075 of 1969.

22. pp v Abdul Ghani; Selangor Criminal Appeal No. 7 of 1971

23. pp v Nordin; Selangor Criminal Trial No. 30 of 1968

24. pp v Sinnappan; Selangor Criminal Trial No. 32 of 1968

25. Lee Yoke Chan; Petaling Jaya Arest Case No.

26. Wong Pak Woon; Kuala Lumpur Summons Case No. 4539 of 1972.

27. Jones v pp (1952) M.L.J. p.43

28. Melvani v pp (1971) 1. M.L.J. p.37

29. pp v. Subramaniam; Criminal Appeal No. 83 of 1973

30. Wahab b pp (1964) M.L.J. p.226

31. pp v Idris (1955) M.L.J. p.234

32. Tan Kah Eng v pp (1965) 2. M.L.J. p.272

33. Loh Mah Sau pp (1953) M.L.J. 72

34. Mohammed Ali v pp (1956) M.L.J. p.32

35. Lim Thian Han v R (1953) M.L.J. p.213

36. Yong Pak Yong (1959) M.L.J. p.76

LIST OF ABBREVIATIONS

C.P.C.	-	Criminal Procedure Code, F.M.S. Cap.6
P.C.	-	Penal Code
K.L.	-	Kuala Lumpur
P. Jaya	-	Petaling Jaya
S'pore	-	Singapore
Cr. Ap. No.	-	Criminal Appeal number
S.	-	section
ss.	-	sub-section
p.	-	page
M.L.J.	-	Malayan Law Journal
M.L.R.	-	Malayan Law Review

INTRODUCTION

Objective and Scope

Much material, information on sentencing in other countries, for example, America and England are available in this country. In this study, however, I have proposed to deal with certain aspects of sentencing in Malaysia. Sentencing is a very wide topic and it will be practically impossible to cover almost every aspect of it within the limited length of the study. I also feel that certain aspects, for instance the various theories of punishment, the pros and cons of such theories, the detailed accounts of the forms of punishment, have been dealt with in many books on sentencing and it will not serve much purpose for me to reproduce them here.

The first chapter deals with the various kinds of punishment that were meted out from the time of the Malacca Sultanate till the adoption of the Penal Code. A comparison is made with the kinds of punishment that were meted out in England around that time.

The second chapter deals briefly with the goals of punishment and gives an account of some common offences and how the courts treat these various categories of offences.

The third chapter deals with the various criteria used in assessing sentence in Malaysia.

The various forms of punishment available in Malaysia are dealt with in the fourth chapter.

The fifth chapter concludes the study with some suggestions on the forms of punishment.

Methodology

For the purpose of this paper, I have referred to both reported and unreported cases on appeals against sentence, articles and newspapers, and have interviewed the learned magistrates of the lower courts, both in Kuala Lumpur and Petaling Jaya.

CHAPTER I

THE LAW AND THE KINDS OF PUNISHMENT ADMINISTERED IN MALAYA FROM THE TIME OF THE MALACCA SULTANATE TILL THE ADOPTION OF THE PENAL CODE

A. The law and punishment before the period of the Malacca Sultanate

Although people have been living in Malaysia since at least 500,000 years before the birth of Christ and traders from India, Arabia and other parts of South East Asia visited the Malay Peninsula during the first millenium of the Christian era, unfortunately only after 1402 do sources of law exists which enable us to look at the legal developments and evaluate the methods of punishment.

At the beginning of the Christian era, ideas of Buddhism and Hinduism were brought to Malacca, mainly through the traders. Hindu custom and law had their influence on Malay life and society and the influence of Hindu law and custom is seen in the court heirachy, prerogatives and ceremony. The Malay Criminal law too followed the pattern of Hindu law. Hinduism had its influence on the Malay states due to the fact that during the first to the thirteenth century a number of Hinduised empires like Funan, Sri Vijaya and Majapahit held sway in South East Asia. The Hindu Criminal which left the most trace in Medieval Malay States is characterised by lex talionis. The offender shall lose the limb

that was used in the offence, unless he is of a higher caste than the offended. Caste distinctions varied the penalties and retaliation was only carried out when a member of a lower caste asaulted or insulted one of a higher caste. In case of equals fines were mostly imposed on the culprit.

Penalties consisted of four groups: admonition, reproof, fines and corporal punishment (mutilation, torture, death). Execution was carried out by impaling, hanging or drowning. Open prison houses, or other cages were built on public roads in order to discharge the public from criminal acts by the sight of horribly mutilated criminals, a practice which was followed in the Malay States.[1]

B. The Malacca Sultanate and the laws on punishment

Around the fourteenth century, when Malacca came under the influence of Islam, Muslim law which was at first adopted in matters of pure religion only, gradually penetrated into Malay Criminal law. The laws of Malacca show considerable Muslim penetration.[2] Some idea of the law in force in Malacca at the heyday of the Malacca Sultanate can be gathered from the Malacca Code[3].

---

[1]Professor Ahmad Ibrahim, Malaysian Legal History, p.15

[2]The imposition of such an impractical fine as the camels shows Muslim penetration - Part LXVI of the Malacca Code, punishment for assault is 5 heads of camels.

[3]T.J. Newbold, Political and Statistical account of the British Settlement in the Straits of Malacca, Volume 2, pp 231-313

Like the many other unsophisticated systems of the world, the Code did not define the various offences. But a perusal of the Code shows that some distinction was drawn between offences against the sovereign, offences against individuals and offences against property. The various offences are not neatly categorised under the three, but the distinction between them can be found nevertheless in the Code.

For example Part IV of the Malacca Code provides the law relating to the inhabitants of cities and villages. It reads:

> Persons killing others in quarrels, murderers and those who stab, cut, rob, persons refusing to conform to the decisions of their sovereign or who forge the royal edicts, or deny its authority are criminals whether they be inhabitants of cities or villages.
>
> Should the offender be a great man he shall be fined to the utmost extent, but if a person of low condition, the fine shall be one tahil and one paha of gold.

In this section of the Code, we find that offences against persons, property and the sovereign are grouped together and some references as to what are the offences against the sovereign is given in this part, i.e. forging the royal edict and denying its authority. The punishment varies as regards the status of the individual. What is the actual meaning of 'great man' is not known but it could probably refer to a person of good means and respect.

Part V of the Code recognises the killing of persons with or without just cause. It reads:

> If a person kills another without a just cause according to the law of God which is named "just" he shall be put to death.

Offences of killing without the knowledge of the sovereign or his minister or persons in authority are classed under the four heads. First, that of a person killing another who has seduced his wife. Secondly, that of killing an angkara. Thirdly that of killing a thief and fourthly that of killing a person who has dishonoured the killer by a blow or who has inflicted the great disgraces (adultery, etc.) In all these cases to kill is lawful provided the matter be not already before the judge who shall fine the offender one tahil and one paha.

This part of the Code relates to the offence against individuals and it also provides the circumstances in which it would be lawful to cause death.

Part VII of the Code provides for the offence of theft. It reads:

Should the owner of the enclosure discover and kill the thief on the spot or pursue him between his enclosure and the next and there kill him he shall be held blameless. But should he meets with the thief some day afterwards and then kill him, he will have transgressed the law.

Besides these, the Code also provides for other offences like rape, abduction and assault which can be found in most penal codes.

The punishment provided for in the Code on the whole does not reflect the gravity of the offence for example in Part IV it provides that a murderer or a person who stabs another be fined whereas in Part V it provides that a person be killed for committing theft.

Both fines and corporal punishments were imposed, but one feature which is distinct is the imposition of fines for almost every offence ranging from murder to assaults.

Death was the most common corporal punishment inflicted while in the case of adultery other punishments like burying the criminal

to the waist, stoning and striking the person with a ratan was provided. A year's expulsion from the city was also imposed in such cases.

Although the Malacca Code provides for the various offences and punishment, it is still an open question as to how much of the law was actually put into use.

Professor Ahmad Ibrahim in his book[4] states that the alternative to the death penalty in Malacca of the fifteenth century were such punishments as scalping or cuttings out the tongue of a betrayer of royal commands. In medieval Malacca, the Professor writes, a man was impaled, burnt alive or beaten on his chest to death according to the nature of his crime.

The last Sultan of Malacca is alleged to have had his Lord High Admiral castrated for bringing false charges that led to the execution of the Prime Minister.

C. Punishment during the Portuguese and Dutch period

The Portuguese, the first Europeans to come over to Malaya, occupied Malacca from 1511-1641. The Portuguese appointed seven leading citizens of Malacca to act as magistrates and vested them with civil and criminal jurisdictions. Appeals could lie from them to the Ouvidor or Chief Justice and finally to the High College of Justice in Goa.[5] Besides imposing fines, the Portuguese

---

[4]Professor Ahmad Ibrahim, Towards a History of Law in Malaysia and Singapore, p.7

[5]Joginder Singh Jessy, Malaysia, Singapore and Brunei 1400-1965.

also sentenced the offenders to corporal punishment which can be termed as ferocious.

Munshi Abdullah, in his account of his life, writes of the various kinds of punishments that were in force during the time of the Dutch[6]. The Prison itself was built by the Portuguese and the various instruments used by them for torturing and killing people who were later used by the Dutch who occupied Malacca from 1641 till the British occupation.

In his account, Munshi Abdullah writes of the torture chambers within where prisoners were tortured before they were executed. "The men were placed on raised slabs and their joints were struck with hard blows until they were broken, then they were hanged at Pulau Java", he writes in his account.

Others were branded with pieces of iron larger than size of a silver dollar which was heated red hot and then applied to a man's back. After this, they were chained. There was also a place where men were strangled, the scaffold and the iron where they were executed, the barrel in which the convicts were rolled and finally the dark dungeon where criminals and debtors were incarcerated.

Of the barrels, Abdullah writes,

"The barrels had nails driven through them so that their

---

[6]H.A. Hill, Hikayat Abdullah, p.61-62

points projected inwards. Those who committed unnatural offences were rolled about inside them till their bodies were torn to shreds.

The dark dungeon was a cell so enclosed that no daylight could penetrate. The cells had no windows and prisoners had nowhere to sit down or sleep. It had the bare earth as a floor and the place was used also as a latrine.

Like the Portuguese, the Dutch who occupied Malacca were also well known for their punishment by torture. The various kinds of punishment that he described were actually used by the Dutch, writes the Munshi in his account.

Professor Ahmad Ibrahim in his book[7] gives us one incident which reflects the severe punishment which was meted out by the Dutch.

He writes,

"When a crew of a Dutch patrol ship butchered the crew and passengers of a Moorish ship off Kedah in revolting circumstances the Netherlands East India Company sentenced the offenders to lose their right hands and to be broken on a cross before execution. Keel Hauling was regarded as a mild punishment for the company's servants. Slaves were inhumanly flogged."

The British who subsequently occupied Malacca, did away with these kinds of punishment. Lord Minto, writes Abdullah, ordered

---

[7] Towards a history of law in Malaysia and Singapore, p.9

the instruments which were used for torturing and killing to be destroyed. He burnt the stocks and racks and released the debtors from the Dutch prison at Malacca. Lord Minto also ordered the prison cells to be broken and he rebuilt them in a new style. Munshi Abdullah relates that the gaols built by the British had windows and stone pavement for floor. It was divided into rooms and had a proper place for sleeping. At night these cells were lit by a lamp and the prisoners were allowed to be visited by their families. Their only punishment, Abdullah says was the loss of their freedom.

"It was a happy accident of history writes Professor Ahmad, that by the time the British came to impose a uniform system of criminal law throughout the Malay Peninsula, law was coloured with humane ideas that followed the French Revolution. When Lord Minto burnt the stocks and released the debtors from the prison at Malacca, it was no idle gesture but the symbol of a new era."

The punishments meted out in England and America around the 15th, 16th and 17th centuries when compared with those administered in Malaya (i.e. during the time of the Malacca Sultanate, the Portuguese and Dutch occupation in Malacca) shows that they were no less severe. The kinds of punishment that were imposed in England were designed to inflict great pain and torture on the offenders. The stocks, the pillory, the whipping post, the bilboes, the ducking stools and the branding irons were some of

the instruments used for punishing the criminals.[8]

D. The kinds of punishments meted out in England and America during the 15th, 16th and 17th centuries

In England during the 15th century, petty thieves, unruly servants, gamblers, drunkards, vagrants and a variety of other offenders were all punished by the stocks.[9] The most notable person to sit on the stocks around the year 1500 was Cardinal Wolsey. The American colonists followed the laws and customs of their fatherland. Alice Morse Earle writes that this punishment was widely used in America around the 15th and 16th centuries and gives various instances.

The Pillory was another instrument that was used for punishing Englishmen who committed arson, treason, prejury, blasphemy and various other offences.[10] The pillory lingered long in America and in England. Miss Earle in her book writes of

---

[8] Alice Morse Earle, Curious Punishments of Bygone days, p.29-42

[9] The stocks were formed by two heavy timbers, the upper one of which could be raised and when lowered was held in place by a lock. In these two timbers were cut two half circles which met two similar notches when the upper timber was in place and this formed round holes holding in place the legs of the imprisoned culprit, sometimes the arms were thrust into smaller holes similarly formed. Usually the culprit sat on a low stool with his legs confined. Thus securely restrain, he was powerless to escape the jests and jeers of every idler in the community.

[10] The pillory was an upright board hinged or divisible in twain, with a hole in which the head was set and usually with two openings also for the hands. Often the ears were nailed to the wood on either side of the head hole.

one instance where one Hawkin was sentenced in the state of New England (1801) to stand in the pillory with his ears cropped. In England, Lord Ellenborough sentenced a blasphemer in 1812 to the pillory for 2 hours and in 1814 he sentenced another prisoner to the pillory for spreading false news.

The whipping post was another popular form of punishment. In the reign of Henry the VII a famous whipping Act was passed by which all vagrants were to be whipped severly at the cart tail "till the body became bloody by reason of such whipping." This enactment remained in force nearly through the reign of Queen Elizabeth when the whipping post became the usual substitute for the cart. The offenders (even those who committed petty crimes) were fastened to the cart and were led through the streets to a public spot where they were whipped at the back. The whipping at the cart tail even until this century in America (19th century).

Branding and maiming were other kinds of punishment that were in use in the 16th and 17th century England. Blasphemer were punished by boring their tongues with a red hot iron and burglars were branded on their hands. In America, branding was legal and in some states like Maryland, every country was ordered to have the branding irons. The lettering was specifically defined S.L. stood for seditious libel and could be burnt on either cheeks. M stood for manslaughter and T for theft, R was for rogue and was branded on the shoulders.

Such were the kinds of punishments that were used in England

from the early times till the last century. Such punishments like whipping on the cart tail, the pillory and branding remained in use till the last century, while in Malaya, we find that the various punishments aimed at torturing and branding the offenders were put to an end when the British took over Malacca in 1795.[11] The punishment administered by the British were however coloured by humane ideas and were unlike those administered in England around that time. Not much is known about the kinds of punishment that were administered by the British when they occupied Malacca, although we know that they destroyed all the instruments that were used for torturing the criminals and introduced better prison conditions.

E. The reception of English law and the adoption of the Indian Penal Code

The reception of English law in the Malay peninsula began with the acquisition of Penang and the various charters of justice. Little is known about the kind of punishment imposed in Penang immediately after the acquisition. Some account of the kind of law and punishment administered in Penang is given by Roland Braddel in his book on the law of the Straits Settlement.

---

[11] Roland Braddel in his book, The Law of the Straits Settlement, a commentary, Volume II, p.72 writes that in Penang, "some offenders were also branded and exposed to the public but this was abolished by Act II of 1849.

On the history of the criminal law in the colony, he writes,[12]

"In 1794 a body of Regulations was passed by Lord Teignmouth, the Governor General of India for preserving the peace of Penang, and these appear to have been the only criminal law in force down to the granting of the Charter of 1807. For the first twenty and odd years, crime in Penang was repressed and punished by a kind of martial law that is, by such punishments as a Court Martial pronounces and the chief local executive authority or the Governor General of India in Council, considers appropriate to the offence. Even after the granting of the first Charter of Justice, the practice obtained in Penang for a single Justice of Peace sitting at the Police Office to flog, fine or imprison petty offenders at discretion. Braddell writes that by the Charter of 1807 the Criminal law of England was extended to the Colony, and the Charter of 1826 introduced the law of England as it stood on November 26, 1826 and this included the criminal law.

"Until the Penal Code came into force," writes Braddel, "crimes were punished by death transportation, which in the case of Europeans and Americans was abolished by Act XXIV of 1855, penal servitude, hard labour, forfeiture and fine. Some offenders were branded and exposed to the public but this was abolished by Act II of 1849."[13]

---

[12] The Law of the Straits Settlement, Volume II, p.70

[13] Roland Braddel, The law of the Straits Settlement Volume II p.72

The criminal law applied in the Straits Settlements was originally English law, in so far as local circumstances permitted. In 1870 legislation modelled on the Indian Penal Code was introduced in the Straits Settlement; and in the same year a Criminal Procedure Code was enacted.

British intervention and protection began with the state of Perak in 1874 and was soon extended to the states of Selangor, Negeri Sembilan and Pahang. Frank A. Swettenham gives us an indication of the kind of law and punishment administered in Perak during the early days of the British intervention.[14] When the first Resident, J.W.W. Birch was assassinated, all the accused were formally charged and prosecuted in court. Colonel Dunlop and Frank Swettenham prosecuted on behalf of the government, the accused were defended by a member of the Singapore bar. After the trial which lasted for 8 days was over, they were found guilty and sentenced to death. Sultan Abdullah who was also implicated in this was banished to Seychelles Isles.

In the early days of the British intervention, in the Malay States, writes Professor Ahmad Ibrahim, justice was dispensed by civil servants not necessarily trained and the administration was criticised. The sentences imposed in certain cases were unduly heavy. In 1891 for example, a young boy was sentenced to 3 years imprisonment for having made a false charge of having published a

---

[14]Frank A. Swettenham, Malay Sketches, pp. 246-247

slander concerning an official of the Selangor government.

The Straits Times criticised the unduly heavy punishment imposed. It reported:

"One punishment which suggested itself as suitable for an accusation made by such a lad is a severe flogging administered by the man slandered, or if the lad must be brought before the court, surely in consideration of his youth and the recommendation of the jury to mercy, some lighter punishment might have been devised than three years imprisonment."

Before the year 1896, appeals in each of the Federated Malay States lay to the Residents Court with final appeal to the Sultan in-Council. Magistrates followed the Indian law and procedure as far as possible.[15]

The Penal Code and the Evidence Ordinance based on Indian models were introduced in 1905 and a Criminal Procedure Code was introduced in 1902. The Penal Code and Criminal Procedure Code was finally extended to the Unfederated Malay States.

Before the Juvenile Courts Ordinance of 1947 came into effect adult and juvenile offenders were tried in the same court and

---

[15] Professor Ahmad Ibrahim, Towards a history of law in Malaysia and Singapore, p.50. The Professor adds that the Selangor Regulation 11 of 1893 provided that subject to the local laws and established custom, all questions arising in any of the courts of the state were to be dealt with and determined according to the principles, procedure and practice so far as applicable of the Straits Settlement Penal Code, Evidence Ordinance, etc.

and juveniles were even committed to prison.[16] This was so despite the provisions relating to young offenders in the Criminal Procedure Code. With the coming into effect of the Ordinance, however, they were tried under the provisions of the Ordinance and sent to the various approved schools.

The Penal Code had various kinds of punishments which were later abolished by the Criminal Justice Ordinance (F.M. Ordinance 14/1953). The Ordinance abolished for example whipping with cat o' nine tails, rigorous imprisonment, and solitary confinement. It also deemed that life imprisonment be imprisonment not exceeding 20 years.

F. The Criminal Justice Ordinance and the provisions relating thereto

The Criminal Justice Ordinance brought about some changes in the law relating to the forms of punishment. Below are set some of the provisions.

Section 2(1) of the Ordinance reads

No person shall be sentenced by a court to penal servitude and every law conferring power on a court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence would have passed in that case immediately before the commencement of this

---

16 Prisons Department, Selangor Annual Report 1905-1907
In 1905 - 2 juveniles were committed to prisons.
In 1906 - 6 juveniles were committed to prisons.
In 1907 - 15 juveniles were committed to prisons.

Ordinance.

Section 2(2)provides,

No person shall be sentenced by a court to rigorous imprisonment or to simple imprisonment and every law conferring power on a court to pass a sentence of rigorous imprisonment simple imprisonment or imprisonment of either description shall be construed as conferring to pass a sentence of imprisonment for a term not exceeding the term for which a sentence of rigorous imprisonment, simple imprisonment or imprisonment of either description could have passed in the case immediately before the commencement of this Ordinance.

Section 3 reads,

Where any person is treated as having been sentenced or is hereafter sentenced to imprisonment for life, such sentence shall be deemed for all purpose to be a sentence of imprisonment for twenty years.

Section 4 reads,

No person shall be sentenced by a court to whipping with cat o' nine tails and every law conferring power on a court to pass a sentence of whipping with rattan.

The objects and reasons for the passing of the Criminal Justice Ordinance 1953 were stated as follows in the Bill:-

The modern conception of penal administration is that once a court has sentenced an offender to detention the question of how he should be treated during the term of the sentence should be left to the prison authorities. It is the prison authorities who are specially trained to deal with prisoners in such a way by means of reformative punishment they will have a chance of becoming better citizens. Penal servitude is obsolete as a punishment and the division of imprisonment into rigorous and simple as imposed by court hampers the prison authorities in carrying out their duties so as to achieve the best results from a sentence of detention.

The object of the Bill which is in the main based on the provisions of the Criminal Justice Act of 1948 of the United Kingdom is to abolish penal servitude, rigorous imprisonment and simple imprisonment and substitute in their place imprisonment as

as the punishment to which an offender is liable.

The opportunity was also taken to bring the law into line with modern line of penal practice in the Federation by abolishing whipping with cat o' nine tails and the archaic punishment of solitary confinement which is at present provided by S.73 and S.74 of the Penal Code.

The Criminal Justice Ordinance thus sought to mitigate the harshness of the punishment which were imposed before 1953.

As far as life imprisonment is concerned the Ordinance provides that it shall not exceed 20 years. In this instance it is useful to look at the Federal Court decision in Patesegamani v pp[17].

The accused in this case was found guilty of an offence under S.304 of the Penal Code which allows punishment with imprisonment for life or imprisonment with 10 years and fine. The judge imposed a sentence of 15 years. On appeal against sentence, Federal Court judge Azmi in his grounds of judgement said:

" ... the learned judge came to the view that since S.3 of the Criminal Justice Ordinance 1953 a sentence of imprisonment for life shall be deemed for all purpose to be a sentence for 20 years he could pass a sentence between 10 - 20 years. With respect we are unable to agree with this contention. In our view, a sentence of imprisonment for life is a sentence for the rest of the

---

[17] Federal Court Criminal Appeal No. 9 of 1970.

remaining natural life of a convicted person provided it shall not exceed 20 years. That section is intended for the purpose of calculating remissions."

The Privy Council in Kishori Lal v Emperor in considering sentence to transportation for life said this

"The only sentence known to law which can exceed 14 years is one of transportation for life with the exception where transportation is part of the sentence, the term is always for life. Convicts serving the sentence may be granted remission for good conduct and for the purpose of calculating remission in the case of life sentence it appears they are treated as sentence of 20 years. There is no doubt the reason why S. 57 of the Code provides that for calculating a fractional part of life sentence it should be treated as one of 20 years.

Therefore in our view, the sentence of 15 years imposed by the trial judge is illegal. For the above reason we set aside sentence of 15 years and substitute one of 10 years.

The forms of punishment as can be imposed by our courts on adult persons can be classified as

(1) death

(2) imprisonment

(3) fine

(4) binding over

(5) conditional or unconditional discharge.

CHAPTER II

SENTENCING: THE AIMS AND POLICIES

This chapter will be dealt with under the following heads:

(A) General theories of punishment

(B) Punishment likely to vary with the moral criterion of the individual sentencer

(C) Some common offences in Malaysia. How the courts view these offences, and the penal philosophy in sentencing as seen in our courts.

(A) General theories of punishment

The questions of moral justification arises in all cases where penalties are imposed on offenders. The major propositions concerning punishments which are called deterrent, retributive or reformative theories of punishment are moral claims as to what justifies the practice of sentencing - claims as to why morally it should or may be used.

The three traditional goals of sentencing are

(1) retribution

(2) deterrence

(3) rehabilitation

Punishment as a retribution belongs to a penal philosophy that is considered as archaic and discredited by history. This theory is based on the assumption that society has a categorical

obligation to impose a certain penalty and it would be wrong not to impose it. This according to the theory should be because the individual on whom the punishment is inflicted has committed a crime and that the punishment be 'just deserts' for his deeds. The aim of course is that the offender should suffer or atone for his deeds. This theory of retribution refers to the past deeds, i.e. a person is punished for what he has done.

The other theory of punishment is deterrence. All the criminal codes in this world have deterrence as their primarily and postulated goal. The design of the penal codes in all English speaking countries was the brainchild of the classical jurisprudence repudiated vengeance as a proper aim of criminal justice and affirmed that the sole justification is the deterrence of crime. The theory of deterrence is based on the assumption that the offender should be punished so that he would not commit any such future crimes. The punishment is meted out, not only to intimidate him, but also to intimidate potential offenders. The distinction between retribution and deterrence is very fine indeed. While the theory of retribution refers to the past deeds, it is argued that the theory of deterrence however is based on the assumption that a person ought to be punished so that he will not commit any crimes in the future. But it is difficult to distinguish between the retribution and deterrent theories in any other way. What are we doing when we punish a person for his acts under the title of deterrence? Aren't we punishing him for what

he has done?

The major opposition to the deterrent theory arose from the rehabilitative school of penology of the nineteenth century. With the advent of social science to the arena of punishment however is the clearly defined school of thought whose insistence on reform of the convict as the central theme of criminal sanction excludes or subordinates all other ends of punishment. Science became the means replacing religion and moral exhortation whereby bad men were turned into good. The essential points of this ideal is that human behaviour is the product of antecedent causes and that the measures employed to treat the offender should serve a therapeutic function that such measures employed to effect change in the behaviour of convicted person in the interest of his own happiness and in the interest of social deface.

In Malaysia we find that whatever theory or moral claim the sentencer may uphold is entirely within his discretion. With the exception of murder under S.300 of the Penal Code which carries a fixed penalty, our statutes and ordinances do not stipulate specific penalties. As it was said in Abu Bakar v pp[18].

" . . . Our law does not therefore fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the court to decide what is within the maximum the appropriate sentence for each criminal in the particular circumstance of each case not

---

[18] 1953 M.L.J. p.56

only with regard to each crime but with regard to each criminal the court has a right to decide whether to be lenient or severe . . . "

The question of whether to be severe or lenient depends largely on the penal philosophy of the sentencer in each particular case. To illustrate this, we shall look at the cases of Tayalam v pp[19] and pp v Ahmad Ngo[20].

B. Punishment likely to vary with the moral criterion of the individual sentencer

In Tayalam's case, the accused with two others broke into a flat and committed theft of property to the value of $46/-. He was convicted for the offence of housebreaking. The accused who was 18 years old at the time of the commission of the offence was sentenced by the magistrate to 2 years imprisonment. The learned magistrate in passing sentence said:

The accused with two others broke into the flat with another waiting outside the premises. The two inside passed outside articles as in the charge. The police came and arrested one of them. On the same day the accused was arrested. The accused admitted the facts and he was found guilty. In passing sentence I considered the probation report and the seriousness of the offence. The accused was a member of a group of boys who used to

---

[19] Selangor Criminal Appeal No. 31 of 1972

[20] Arrest case No. 3241 of 1972. Sessions, Kuala Lumpur

loiter around and smoke ganja which the accused denied. He was found guilty in the juvenile court on a charge under S.380 of the Penal Code.

The manner in which the crime was committed led me to believe that it was well planned and pre-arranged. The fact that the accused was acting with two others showed there was organisation proper, albeit small which if undeterred would grow into a big time game.

For the above reasons I sentence the accused to 2 years imprisonment hoping that it will act as a deterrent to future involvement in crimes by him and his associates.

In pp v Ahmad, the accused with others committed theft of property, a Wolsley car valued at $2,500/-. The learned magistrate in his grounds of judgement said:

He is a youth of 19 and a school dropout. He failed his L.C.E. in 1968. Since then he helped another at a foodstall. On one occasion he was a student apprentice . . . On the social side he had a lot of friends. He was in bad company and he took ganja.

With this historical background I believe it grossly improper to sentence him to imprisonment. As such I fine him $200 for the simple reason that the person who paid the fine is the father. And above all a heavier sentence would mean the father may not be able to pay the fine and he may have to go to prison which is precisely what I intend not to do.

I believe that despite his previous conviction he should be given another chance.

The distinctions between the two cases is as follows.

	Tayalam case	Ahmad case
1. offence	housebreaking	theft
2. age of accused	18 years	19 years
3. value of property	$48/-	$2,500/-
4. previous conviction	one, house-breaking	one, house-breaking
5. was conviction taken into account in assessing sentence?	yes	no
6. year and court where case was tried	1972, Magis-trates Court, K.L.	1972, Magis-trates Court K.L.
7. punishment	2 years imprisonment	fine of $200/-

In Tayalam's case the accused was convicted of housebreaking, which is considered a serious offence, while in Ahmad's case, the accused was convicted of theft. The value of the property involved in Tayalam's case was only $46 while in Ahmad's case it was $2,500.

Apart from the above differences, both accuseds were under the age of 21, both had committed the offence jointly with others and had previous convictions. But in Tayalam's case the learned Magistrate felt that a deterrent sentence should be imposed and he took into consideration the accused's previous conviction. In Ahmad's case, however, the learned magistrate felt that the accused

should be given another chance (presumably to reform) and should be kept out of prison. He however did not wish to take into consideration the previous conviction and he accordingly fined the accused.

On appeal (Tayalam sentence being manifestly excessive, and Ahmad's case, appeal by the Public Prosecutor on the inadequacy of sentence) the judges in both instances sent the accused to Henry Gurney School.

When the sentence appears to be manifestly inadequate, the Public Prosecutor usually appeals against the decision. But the situation is very difficult in cases where the sentence is excessive and where the accused is unrepresented by counsel. Hardly can one expect the accused (layman) to know of his right to appeal in person and the way to go about it.

C. Some common offences in Malaysia; How courts view these offences - The penal philosophy in sentencing in our courts

The policy behind sentencing can be ascertained by looking at the various cases under the classes of offence.

Theft

Magistrates are quite lenient in dealing with cases of theft. Magistrates do not normally impose deterrent sentences, and it is quite usual for offenders to be fined or bound over. This is probably due to the fact that a great number of such offences are committed without premeditation.

In pp v Ahmad[21], the magistrate merely fined the accused for

the theft of a car and he felt the accused should be given another chance.

In pp v Tan Eng Hock[22], once again for the offence of theft of a car, the accused was bound over under S.173A of the Criminal Procedure Code.

In pp v Mohammed Ismail[23], the magistrate bound over the accused who was found guilty of the offence of theft in a dwelling house.

Although the magistrates can and do treat the offence of theft as not being serious and impose lenient sentences, yet if that particular kind of theft is prevalent the judicial pronouncement in Tan Eng Hock's case suggests that sentences like binding over would be inappropriate.

On appeal by the Public Prosecutor, the judge in this case, among other factors considered the prevalence of the particular kind of offence. He said:

". . . car theft is a fairly common offence and invariably leads to more serious crimes. It is manifest, having regard to the number of such cases, that a sentence of binding over is neither appropriate nor relevant enough." The learned judge, allowed the appeal and sentenced the accused to 18 months

---

[21] Arrest case No. 3241 of 1972; Sessions, Kuala Lumpur

[22] 1970, 2 M.L.J. p.70

[23] Selangor Criminal Appeal No. 150 of 1973

imprisonment.

Housebreaking

In Tayalam v pp[24], the magistrate felt that a deterrent sentence should be imposed because of the fact that the crime was "well-planned and pre-arranged" and there was also "an organisation proper which if undeterred would grow into a big time game". He accordingly sentenced the accused to 2 years imprisonment.

In the case of Abdul Rahim v Zab[25], the accused was convicted of housebreaking and theft and was sentenced to 6 months imprisonment. The magistrate in his grounds of judgement said:

"In assessing sentence against the accused I took the following into consideration. That the cash amounted to $1,152; The adding machine was not recovered and it meant a substantial loss to the complainant. One other factor which had to be taken judicial notice is that in the past year or so there has been an alarming increase in housebreaking and theft in this district. In the year 1973 alone a total of 1,148 cases of housebreaking and theft were reported of which 186 persons were arrested or detained. In 1974, 2,112 of such cases were report of which 389 persons were arrested and the total number of loss ran to a tune of $846.353.66. This meant there was more than 100 percent increase over the 1973

---

[24]Selangor Criminal Appeal No. 31 of 1972

[25]Criminal Appeal 3 of 1975. Petaling Jaya, Magistrate's Court.

statistics and considering that only a small percentage were actually found guilty and convicted raised an eyebrow.

Again the figures clearly indicated the clear need of strict enforcement of the law and I shall be failing in my duty to the public if I don't mete out a fair and adequate punishment.

Cases of housebreaking are generally considered to be a serious offence, because such cases usually involve delibration and premeditation. In such cases, as the above cases show the elements of public interest and deterrence are considered.

Breach of Trust

Courts take a serious view of such offences and nearly in all cases, the offenders are sentenced to imprisonment.

In Maimunah v pp[26], the accused, a woman committed breach of trust of certain jewelleries belonging to the complainant. The magistrate felt that a deterrent sentence should be imposed and sentenced her to 2 months imprisonment. On appeal the High Court judge sentenced her to 1 day's imprisonment[27] and a fine of $400.

In Liew Yew Siong case[28], the accused, a lawyer was convicted of committing breach of trust of a sum of $25,000 belonging to the complainant. The magistrate sentenced the accused to 3 years imprisonment, his reasons being:

"The accused was committed of an offence under S.409 which is

---

[26] Selangor Criminal Appeal No. 104 of 1974.

[27] 1 day's imprisonment does not involve actual imprisonment. It is formal only.

a very serious offence. The sum that the accused misappropriated was $25,000. Though the offence was committed in 1970 up-to-date no restitution has been made to the complainant. Even though he is a first offender the nature and the circumstance of the case is such that the Court can't regard it with leniency. The accused had acted with knowledge and knew the consequences of misappropriation of someone else money. He acted contrary to the trust placed upon him as an advocate and solicitor and I had no other choice but to treat this conduct with all the seriousness it deserves. This conduct on the part of the accused is detrimental to the good name and confidence the public had placed on the member of the learned profession. It is his duty to uphold the law and not to break it.

A solicitor or advocate has a duty to perform in society and he has to perform it with the honesty and integrity for the proper functioning of the law. Although the accused had pleaded guilty and showed repentance to his act, this does not admonish him from the wrong he had committed. Public interest has to be served and protected and as such I had passed a sentence which I feel is proper.

It is important that justice be done and also it is seen to be done. It will be unfair on my part to treat the offence with

---

[28] Selangor Criminal Appeal No. 121 of 1972

leniency just because the accused is a member of the learned profession. The legislature realised the seriousness of the offence by imposing a 10 years maximum sentence for offenders.

On appeal, the judge, Abdul Hamid reduced the sentence to one of 2 months imprisonment and a fine of $2,000 in default of which he was to undergo a year's imprisonment. The learned judge said:

" . . . I do not think for a moment or suggest that this serious offence for which he was convicted should be viewed less seriously because he is an advocate and solicitor. However, the Court can't ignore the fact that he will face disciplinary proceedings and there is a high probability that he will be struck off the rolls of the advocate and solicitor. The stigma of the conviction for the offence such as this one of being struck off the rolls will have to be borne by him for the rest of his life. It is true that public interest demands that a deterrent sentence should be passed on any person who commits an offence of this nature but it is equally true that each case should be decided on its merits . .. having regard to the facts and circumstances of the case a shorter sentence and fine will be adequate."

In pp v Teoh Hooi Leong[29], the accused, a lawyer was convicted of committing breach of trust of a sum of nearly $100,000 belonging to his client. The magistrate in sentencing the accused to 18

---

[29]Criminal Appeal No. 40 of 1975

months imprisonment said:

" . . . I was asked to exercise leniency as the accused has fully repented for his wrong doing and now faces a bleak prospect of being struck off the rolls. The amount that he misappropriated is however not small as it amounts to $100,000. Bearing in mind the nature of this offence for which he is now convicted and also as a deterrent sentence for others who are inclined to follow his way, I impose a sentence of 18 months."

Justice Harun on appeal sentenced the accused to 3 months imprisonment and fined the appellant $2,000.

The offence of Breach of Trust carries a maximum penalty of imprisonment for life or imprisonment for 10 years and a fine, but we find that in cases of breach of trust by lawyers the sentence imposed seldom exceed 6 months imprisonment. Although courts do consider this as a serious offence and that a deterrent sentence should be imposed yet other factors like the probability of the accused being struck off the rolls and having to bear the stigma of conviction all his life motivates the courts in imposing lenient sentences.

In cases of Criminal Breach of Trust by public servants, the courts have always imposed sentences of imprisonment, so as to have a deterrent effect. This was seen in the case of pp v Ismail Loyok[30].

---

[30] pp v Ismail Loyok. 1958 M.L.J. p.223. The accused was

Corruption and bribery

As far as offences of corruption and bribery goes, the early cases show that the judges made no difference between the givers and the receivers of gratification. Such offenders were dealt with severely and the imposition of fines were considered inadequate in such cases. However, a recent case has established that not all givers of such gratification should be dealt with severely - (Ng Kook Jooi, 1974, 2.M.L.J. p.150.)

In Goh Leng Sai's case,[31] the accused was convicted under the Prevention of Corruption Ordinance, and sentenced to 6 months imprisonment for corruptly giving one R a sum of money as reward for showing favour to him in relation to his principal's affairs. On appeal, the judge as regards sentence, said, 'I consider that in cases of corruption it is necessary to impose a sentence of imprisonment, as a sentence of fine has no deterrent effect.'

---

[30] convicted of an offence under S.409 of the Penal Code. The president considered that the accused, a public servant was a first offender who as a result of his weakness in his character had betrayed the trust which had been reposed in him. He felt that in the circumstances the accused should be given another chance to behave.

On appeal the judge held that "although it is desirable that the first offender should be kept from coming into contact with hardened criminals, nevertheless other public servants will be submitted to temptation if they see that the only punishment which it involves is some binding over. Until it is understood by all public servants in this country that the punishment for helping themselves to public money is to be sent to prison, they will continue to be weak-willed persons prepared to pilfer the till."

The judge altered the sentence to binding over imposed by the lower court to that of 6 months imprisonment.

[31] 1959. M.L.J. p.121

In R v Teo Cheng Lian[32], the accused was found guilty of abetting the offence of giving illegal gratification to a detective and was fined $50.00. The judge on appeal felt that it was improper in such cases to impose a fine and embraced the sentence to one of imprisonment.

In Ng Cheng Tock v pp[33], the respondent was convicted under the Prevention of Corruption Ordinance for offering a bribe to two police officers in order that they might show favour to his father who was charged with dealing with counterfeit notes. The magistrate while recognising that it was a serious offence, placed him on probation for 2 years. On appeal the judge felt that the proper punishment for the offence was a sentence of imprisonment.

---

[32] 1949. M.L.J. p.34
The judge on appeal said:
"There is a world of difference between a gratification illegal or otherwise as between business firms and a gratification to a government or a public servant in carryout out his official duties . . . The learned magistrate had failed to take into consideration the fact that bribery and corruption is like a cancer which may grow and destroy the body and as the mere imposition of a fine is unlikely to act as a deterrent in this class of offence, the sentence in this case should be altered to one of imprisonment."

[33] 2. Malayan Cases, p.229
In this case, the judge said, "The responsibility for maintaining an incorrupt and reliable Police Force rests with the members of the public as well as with officers and members of the force. The respondent in this case did not recognise that responsibility. If his conduct had succeeded or even if it had been connived by the two police officers, it would have struck at the root of the impartial administration of the criminal law and if the conduct became widespread it would destroy the foundations of good government. That was a measure of the gravity of the offence.

In all the three cases considered, the accuseds were members of the public who corruptly offered gratifications to public servants. All the three judges considered that a sentence of imprisonment and not fine should be imposed.

In the recent case of Ng Kook Jooi v pp[34], Justice Arulanaudom felt that the givers of such gratification should be dealt with less severely than the public servants who accept such gratifications.

In Ng Kook Jooi's case, the learned judge said,

"Regarding the question of sentence the learned president held that corruption was an evil and the giver of such gratification to a government servant should be punished adequately.

To my mind while the law makes the giver equally culpable as the receiver in considering sentence, the court should take certain factors into account. The acceptor of bribe is motivated by greed, he betrays the trust reposed in him and brings disgrace to the administration which has entrusted him with a duty to serve the public. He shows no respect for the Rukun Negara and generally has no extenuating factor to be considered on his behalf. The giver on the other hand in such cases as the one before us is motivated partly be fear of being charged before the court and secondly of a desire not to be inconvenient by spending hours in the police stations and lower courts waiting to be tried - an exercise which

---

[34] 1974 2. M.L.J. p.150

involves him in a tremendous loss of time which to a small trader or individual businessman means a loss of income and perhaps disruption of livelihood. To impose sentences as such people as severely as one would impose on public servants to my mind would not be equitable and in public interest. A sentence of imprisonment in such a case as this is obviously excessive."

The judge made a qualification to his statement, he continued, "While I have spoken about the givers there is one qualification I would like to add. All givers of bribes are not in the same category. My remarks are only meant to apply to the giver who is suddenly caught by a traffic constable or a hawker who pitched his stall at the wrong place and is apprehended by a constable, or a cyclist caught riding without bicycle lights. There is another type of giver who should be treated with equal if not more severely than a public servant and that is an organiser of a syndicate to smuggle drugs, to deal in opium traffice, to organise illegal gambling and the like. These givers cannot by any stretch of imagination be treated like the giver in the case before us. For these givers are the very destroyers of society. They deliberately break the law for their own benefit and in order that they may not be apprehended they offer bribes to those in authority and this deliberately pervert justice and corrupt the establishment of law and order . . . "

For these reasons I set aside the sentence of 4 months imprisonment and substitute a fine of $300/-.

Acceptors of such gratification too have been dealt with severely in the past - Abu Bakar v R[35]

In the recent case of Mohammed Taufik v pp[36] a probation officer of the Police Force was convicted under the Prevention of Corruption Act for corruptly obtaining from one W, a gratification of $990 as an inducement for forebearing to do an act in relation to his principal's affairs. The President who tried the case sentenced the accused to two and a half years imprisonment. On appeal however, the High Court judge reduced the sentence to one year's imprisonment and said:

"The learned President quite rightly took into account the appellant's position as a police officer but it is also a fact that the appellant will lose his job as a result of that conviction. I will therefore allow the appeal against sentence. In so doing I am not saying that the offence of this nature should be viewed less seriously. All I am saying is that an imprisonment of one year would in the instant case be adequate punishment and in my view sufficiently deterrent to any police officer who would venture to obtain a bribe. I set aside the sentence of 2½ years imprisonment in each charge and substitute one year imprisonment on each charge."

The courts take a serious view of the offence and always

---

[35] 1953. M.L.J. p.56
Where the accused was sentenced to 4 months rigorous imprisonment for acceptance of an illegal gratification.

[36] 1975 1. M.L.J. p.36

impose a sentence of imprisonment where the acceptor is a public servant. In the case of Mahesan v pp, the maximum punishment afforded by the legislature was imposed on the accused who was convicted of corruptly accepting illegal gratifications as a reward for his services.[37]

In such cases, where public servants are involved, courts impose sentences of imprisonment to act as a deterrent.

Robbery

Judges take a serious view of such offences and offenders are dealt with severely. This is because such offences are committed after much deliberation and planning and it involves at times violence and hurt. Courts usually take into consideration the need for the protection of society and public interest in such cases where the offence is in part an offence against person and property.

In Lee Yew Seng's case, the magistrate considered that deterrent sentences should be imposed. In his grounds of judgement, he said,

"In deciding upon the sentence the court had regard to the manner and circumstance in which the present offence was committed. From the facts of the case it was apparent that a great deal of violence was involved. The use of deadly weapons, namely daggers

---

[37] 1970. 2.M.L.J. p.74
The maximum penalty was imposed, i.e. 5 years imprisonment and a fine of $10,000. Accused was also ordered to repay the $122,000 which he misappropriated to the Housing Society.

had been employed on the victim. I consider this a very serious act and that society must therefore be adequately protected. This can be done in my view by way of imposing a deterrent sentence which will deter not only the appellant but also anyone who may run the temptation of committing the same crime."[38]

The accused was sentenced to 7 years imprisonment and one year police supervision.

Justice H.T. Ong in the case of Lieu Chiew Seng, sentenced the accused to 12 years imprisonment and 8 strokes of rattan[39]. The learned judge said:

"As to sentence under S.392 and 397 of the Penal Code the maximum sentence for the offence is 14 years and whipping.

I pass a sentence of 8 strokes and 12 years imprisonment. The use of a deadly weapon in robbery should be sternly and effectively discouraged. In this case the accused and all his partners in the crime could not have set out in their nefarious expedition to rob with their bare hands. Death has occurred very much oftener when robbers use firearms than knives. Unlawful possession of firearms is already a serious offence, vide the Firearms Amendment Act 1968. I do not think 12 years and 8 strokes is excessive in this case, merely because this was the first time

---

[38]Criminal Appeal No. 21 of 1972. Petaling Jaya Magistrate's Court.

[39]Selangor Criminal Appeal No. 15 of 1969.

the accused had been caught and convicted. Had anybody been hurt I would pass a sentence of life imprisonment. The maximum sentence passed by law is not to be treated as a dead letter.

In Wong Sai Ngou v pp, the accused also a first offender was sentenced to 7 years imprisonment and 8 strokes of rattan[40]. Similarly in the case of pp v Hercharon Singh[41], all the 3 accused (first offenders) were sentenced to 7 years imprisonment and 6 strokes of rattan, one of the accused was 21 years of age at the time of the commission of the offence.

---

[40]Criminal Appeal No. 28 of 1970 (Selangor).
The learned judge considered, "Accused was one of the robbers who robbed the Chinese Overseas Bank . . . On the question of sentence the accused has committed a heinous crime which was well planned, well timed and skilfully executed. He and his colleagues had robbed the bank in broad daylight and shot the cashier in cold blood. Offences of this nature are difficult to prove. Most witness are afraid to identify the robbers for fear of reprisals. Bank robbers are rampant in this country and such crimes should be stopped. When an accused person is found guilty he should be severely punished so that others with similar criminal propensities may be deterred. I accordingly sentence the accused to 7 years and 6 strokes of whipping.

[41]Criminal Appeal No.15 of 1969 (Selangor).

CHAPTER III

CRITERIA USED IN ASSESSING SENTENCE

When considering and assessing sentence in a particular case, the court takes into account various factors. Amongst them are

(a) The statutory factor - the nature of the offence.

(b) Other legal factors like

(1) age

(2) antecedents and character

(3) prevalence of the offence

(4) the circumstances in which the offence was created.

(5) the difficulty of detection and proof.

(6) dismissal from employment.

(7) value of the property involved and the question of restitution.

(8) young offenders and first offenders.

(9) Plea of guilt.

A. Statutory Factor - the nature of the offence. The Penal Code contains an elaborate classification of crimes with their corresponding penalties assessed and determined according to the nature and seriousness of the offence. Generally speaking the more serious the crime, the more severe the punishment, but it does not however mean that in every serious offence, severe punishment ought to be imposed. All the circumstances of the offence should

be considered.

In cases of serious and grave offences like robbery and rape, the court will not hesitate to send a young offender (i.e. between the age of 17-21) to imprisonment - pp v Harcharan Singh[42].

The offence of rape carries a maximum penalty of imprisonment for life, imprisonment for 10 years, fine or whipping. In such cases the court will usually impose sentences of imprisonment which normally exceeds 2 years. In the case of pp v Abdul Bachik[43], pp v Abdul Ghani[44], and pp v Nordin[45], all the accused were sentenced to imprisonment of not less than 5 years. The case of pp v Sinnapan[46] however shos that in not all serious crimes do the courts impose severe punishment. In this case the accused convicted of rape was sentenced to only one year's imprisonment becase of his old age.

---

[42]Criminal Appeal No. 15 of 1969 (Selangor).
The accused in this case was of the age of 21 at the time of the commission of the crime. The court sentenced him to 7 years imprisonment and 6 strokes of rotan.

[43]Selangor Arrest case No. 1075 of 1960.
Accused was sentenced to 5 years imprisonment for the offence of rape.

[44]Selangor Criminal Appeal No. 7 of 1971. Accused was sentenced to 5 years imprisonment for the offence of rape.

[45]Selangor Criminal Trial No. 30 of 1968.
Accused convicted of housebreaking and rape was sentenced to 7 years imprisonment.

[46]Selangor Criminal Trial No. 32 of 1968.
Accused was 59 years old at time of the commission of the offence.

B. Other Legal Factors

Age

In cases where the accused are between the age of 17-21 the courts will normally consider sending the accuseds to the approved schools[47], but in cases of serious offences, the courts will not hesitate to send a person of or below the age of 21 to imprisonment[48]. On the other hand the courts are generally lenient on the punishment where the accused is a person of old age[49].

Antecedents and character of the offender

The antecedant of the offender features prominently in assessing sentence. The court has to pass a heavier sentence on an offender with a previous conviction.

---

[47] In Tayalam v pp (Selangor Criminal Appeal No. 31 of 1972), the judge set aside the sentence posed by the lower court and ordered the accused to be sent to the reform school. Similarly in the case of pp v Ahmad Ngo (Arrest case No. 3241 of 1972), the accused was ordered to be sent to Henry Gurney School, on appeal by the Public Prosecutor against the sentence imposed by the lower court.

[48] Harcharan Singh v pp (Criminal Appeal No. 15 of 1969) where the accused, aged 21 was sentenced to 7 years imprisonment and 6 strokes of rattan for the offence of robbery.

[49] pp v Sinappan (Selangor Criminal Trial No. 32 of 1968) where the accused aged 59, was sentence to only 1 year's imprisonment for the offence of rape.

Section 289 of the C.P.C. provides that males whom the court consider to be more than 50 years shall not be whipped.

In the case of Lee Yew Seng v pp[50], the learned president sentenced the accused to 7 years imprisonment after considering the accused's previous record which showed he had been previously sentenced to 6 years for a similar offence.

A conviction dating back to 8 years or more is regarded as being spent in itself. Any offence committed after such years would be regarded as his first offence.

"The character of the accused may be gathered from the evidence addressed at trial or given in mitigation before sentence is passed. By itself it may not be altogether mitigating, but when taken can jointly with other considerations be a decisive factor that borders between a binding over and a term of imprisonment"[51].

---

[50]Selangor Criminal Appeal No. 21 of 1972.
In assessing sentence, the learned president considered, "the appellant had on previous conviction for a similar offence and was sentenced to 6 years imprisonment. This happened in 1966. It is hardly a few years since he has been released from prison that he committed this offence. It would be seen therefore that the appellant did not appear to have learnt any lessons from the punishment he received from the court in the past. This well leads me to the conclusion that unless a much more deterrent sentence was imposed it was not going to produce any deterrent effect on the appellant and as the previous sentence was for a term of 6 years it would in my view defeat the purpose if the court this time impose lesser terms of imprisonment. To do so would mean indirectly to encourage the appelant to continue his activities."

[51]Taken from the speech of Mr. Ng Mann Sau, Special President Sessions Court 1972.

Value of the property and the question of restitution

In Lee Yoke Chan v pp[52], the accused was convicted of having in his possession goods reasonably suspected to be stolen. Among other factor the magistrate considered was the value of the property involved. The magistrate said,

"Furthermore the value of the property involved in this case was substantial and there was no indication from the prosecution whether or not the victims will be compensated by way of restitution."

The magistrate then sentenced the accused to one month's imprisonment.

This factor was again considered in Abdul Rahim v pp's case[53]. The accused was convicted and sentenced to 6 months imprisonment on a charge of housebreaking and theft. The magistrate in this case said,

"In assessing sentence against the accused I took the following into consideration. That the cash amounted to $1,152 and the adding machine and tape recorder valued at $1,662 was not recovered. This meant a substantial loss to the complainant."

Where the loss to the complainant is great and no restitution has been made the courts will impose heavier punishment. This

---

[52] Petaling Jaya Arrest case No. 219 of 1972.

[53] Criminal Appeal No. 3 of 1975.

could have been a factor which influenced the learned president in Lee Yew Siang's case in sentencing the accused to 3 years imprisonment, for committing breach of trust of the client's money[54].

Circumstances under which the offence was created

The courts will consider whether the offence was committed with or without deliberation, i.e. whether it was committed at the spur of the moment or whether it was premeditated. Where the offence was premeditated, the courts will impose severe punishment.

In Tayalam v pp the fact that the accused had planned the commission of the offence influenced the magistrate in imposing a deterrent sentence.[55] Similarly in the case of Tan Eng Hock, this factor among others influenced the judge in enhancing the sentence.[56]

---

[54]The accused, an advocate and solicitor was convicted and sentenced for having committed breach of trust of the client's money. The magistrate said in that case:

"The accused committed an offence under S. 409 which is a very serious offence. The sum that the accused had misappropriated was $25,000. Though the offence was committed in 1970, up-to-date no restitution has been made to the complainant.

[55]Selangor Criminal Appeal No. 31 of 1972. The learned president in this case said, "the manner in which the crime was committed led me to believe it was well planned and prearranged. The fact that the accused was acting with two other persons showed that there was an organisation proper, albeit small which if undeterred would grow into a big time game."

[56]1970 2.M.L.J. p. 15
In enhancing the sentence, the judge considered that there was deliberation in his act. He said " . . . the fact that he was

Prevalence of the offence

Where certain offences are particularly rampant, the courts normally take this factor into account in imposing deterrent sentences. In the case of Abdul Rahim v pp[57], the magistrate took this factor into account before imposing a sentence of 6 months imprisonment for the offence of housebreaking and theft. The magistrate said:

" . . . In the past year or so there has been an alarming increase of housebreaking and theft in this district. In the year 1973 alone a total number of 1,148 cases of housebreaking and theft were reported of which 186 persons were arrested or detained In 1974, 2112 of such cases were reported of which 389 persons were arrested and the total amount of loss ran to a tune of $48,356.66. This meant that there was an increase of more than 100% over the 1973 statistics and considering that only a small percent were actually found guilty and convicted raised an eye-brow."

In Lee Yoke Chan v pp[58], this element was considered. The accused was convicted of having in his possession porperty reasonably suspected to be stolen, an offence under the Minor Offences

---

[56] arrested a month after the offence was committedand that he had changed the number plate shows this was a deliberate act and not an impulsive act of bravado." The judge then enhanced the sentence from one of binding over to one and a half years imprisonment.

[57] Criminal Appeal No. 3 of 1975 (Selangor)

[58] Petaling Jaya, Arrest case No. 219 of 1972

Act. The learned magistrate said in that case:

" . . . I had considered the option between a percuniary and a penal sentence. The statistics kept in this court shos that since 1970, about 21 of such offences had been registered. In about half of these cases fines have been meted out. Despite that the number still increases and to my mind perceniary sentence generally is not deterrent to others who are like minded."

This element was again considered in the cases of Wong Pak Woon[59] and Tan Eng Hook[60]. Judges refrequently take this factor into account in robbery cases.

Difficulty of detection and proof

"Some offences are difficult to detect, while others such as criminal intimidation and extortion are often difficult to prove.

---

[59] Kuala Lumpur Summons case No. 4539 of 1972.
The accused in this case was convicted under the Essential Powers Ordinance for failing to remove an unauthorised extension of his premises. The court in this case said:

" . . . After hearing a number of cases on this particular offence I was of the opinion that the particular offence was so prevalent in nature that I felt incumbent upon myself to impose a sentence which would have a deterrent effect."

[60] 1970 2.M.L.J. p.70
The judge in enhancing the sentence of the accused considered the fact that car theft was a fairly common offence and having regard to the number of such cases, a binding over was neither appropriate nor relevant enough.

They lack the co-operation of witnesses or victims who are reluctant or too frightened to proffer any information to the police, for fear of retaliation. More often than not such offences are committed in the absence of independent eye witness. These are factors that ought to be taken into account when assessing sentence."[61]

This factor was considered in the case of Wong Sai Ngou[62] and in Lee Yoke Chan[63]. In Wong Sai Ngou's case the court considered:

"Offences of this nature are difficult to prove. Most witnesses are afraid to identify the robber for fear of reprisals".

It took into account this factor in imposing a deterrent sentence.

Young offenders and first offenders

Binding over with and without a conviction is perhaps more apt for young offenders between the age of 17-21 and also for the first offender. Every consideration should be given to whether a

---

[61] Taken from the talk given by Mr. Ng Mann Sau, Special President, Sessions Court, Kuala Lumpur.

[62] Selangor Criminal Appeal No. 28 of 1970.

[63] In Lee Yoke Chan's case, Petaling Jaya Arrest Case No. 219 of 1972, the learned President said,

"Offences which are difficult to detect call for stiffer sentences. I would take judicial notice of the fact that there are far too many suspicious character like the accused in the midst of our community. Only a few offenders are actually brought to court as most victims are not ready complainants."

conviction would mar the future of the young offender in question and in the case of an adult offender whether it would affect his means of livelihood. We should of course take into consideration all factors surrounding the case. It is far more effective to put him on a band for good behaviour than sentence him to a short term of imprisonment which often than not does the offender more harm than good. There are of course certain cases in which circumstances warrant a short term of imprisonment. But I would urge to bear in mind that a series of short term imprisonment may have little effect in reforming an offender and it may have the result of converting him into a habitual criminal. It is desirable that a young offender should be kept out of prison if possible for it would be more beneficial to him and in the long run to society at large that he should be sent to an approved school."[64]

Dismissal from Employment

In Jones v pp[65] it was held that a court ought not to take into consideration the probability of the dismissal of the accused from employment. In the recent case of Mohammed Taufik v pp[66] however, the court took this factor into account in reducing the sentence imposed by the lower court to that of one year imprisonment

---

[64] Taken from the talk given byMr. Ng Mann Sau, Special Presi-dent, Sessions Court to the magistrates.

[65] 1952 M.L.J. p.43

[66] 1975 2. M.L.J. p.

from that of two and a half years. The accused in this case was convicted of accepting gratification while being a probation officer. The judge on appeal said that, "although accepting gratification was a serious offence, yet we cannot ignore the fact that he will lose his job as a result of his conviction."

This factor should be taken into consideration because of the employment and economic situation in our country. Further the employers are very reluctant to give employment to convicted person. The fact that he will lose his job is sufficient punishment for any person and if we are going to impose long terms of imprisonment, we will only be adding to his troubles.[67]

Plea of guilt

One other factor which the courts do take judicial notice of in meeting out lenient sentences is the plea of guilt. This is considered as a plea of mitigation.

In the Singapore case of Melvani v pp[68] the judge held that where an accused person pleads guilty the court in assessing sentence ought to consider such a plea as a mitigating factor.

A perusal of our cases show that the courts do take this factor into account. A plea of guilt shows that the accused has

---

[67] In all cases involving breach of trust by lawyers, the courts before sentencing will consider the fact that the accuseds will probably be struck off the rolls, see Chapter II under offences of "Breach of Trust".

[68] 1971. 1.M.L.J. p.137

reparted for his act and it is on this basis that the courts are influenced in meting out less severe punishment. But a plea of guilt on the other hand saves a lot of the prosecution's time and the courts are by so doing more or less "buying the plea of guilt" in return for lenient sentences.

In the case of Abdul Rahim v pp[69], the magistrate took the plea of guilt into account before sentencing. Similarly in pp v Subramaniam[70], the magistrate said in his grounds of judgement that he took into account the plea of guilt which is a mitigation factor.

In the case of Lee Yew Siang v pp[71], the learned magistrate felt that a plea of guilt should not influence him in giving a lenient sentence. The learned magistrate said in that case:

"A solicitor or advocate has a duty to perform in society and he has to perform it with honesty and integrity for the proper functioning of the law. Although the accused had pleaded guilty and showed repentence to his act, this does not admonish him from the wrong he had committed. Public interest has to be protected and as such I passed a sentence which I feel is proper and appropriate taking intoaccount the accused's station in life".

---

[69] Criminal Appeal No. 3 of 1975

[70] Criminal Appeal No. 83 of 1973

[71] Selangor Criminal Appeal No. 121 of 1972

Other factors which are pleaded and which are taken into account in mitigation are the fact that the accused is married with children and parents to support. This can be seen in such cases like pp v Tan Eng Hock[72] and pp v Subramaniam[73].

---

[72] 1970. 2 M.L.J. p. 15.
The learned judge on appeal said, "The learned magistrate in assessing sentence took into account the fact that the accused was a first offender and that he had a wife and a child and aged parents to support. He therefore bound the accused over under S. 173A of the Criminal Procedure Code.

[73] Criminal Appeal No. 83 of 1973
The magistrate in his ground of judgement said that among other factors he took into account that the accused was married with two children who were schooling.

CHAPTER IV

FORMS OF PUNISHMENT

The forms of punishment in Malaysia varies from a discharge, conditional or unconditional, binding over, fine, whipping, imprisonment and death. In this chapter we shall examine the various forms of punishment and the provisions in the Criminal Procedure Code relating to youthful and adult offenders.

A. Youthful Offenders

Section 293 of the C.P.C. relates to the punishment of youthful offenders[74]. In the case of any youthful offenier convicted before any Criminal Court of any offence punishable by fine or imprisonment, such court may instead of awarding any term of imprisonment in default of the payment of fine or passing of

---

[74] Section 2 of the C.P.C. defines a youthful offender as including 'any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of 7 and under the age of sixteen in the opinion of the court before which such child is convicted.

In the Singapore case of Ah Kau v pp (1974) 2. M.L.J., the learned judge said an adult is not defined in the C.P.C. therefore it should be given its ordinary and everyday meaning of a person who is mature or grown up. An adult cannot be equated with a person who has reached the age of majority unless specifically defined.

A person under the age of 16, the learned judge said comes within the meaning of a youthful offender while a person of the age of sixteen would be considered as an adult.

sentence make various orders under S.293.

(a) order such offender to be discharged after due admonition if the court thinks fit; or

(b) order such offender to be delivered to his parents or to his guardian or nearest adult relative or to such other person as the court shall designate on such parent, guardian, relative or other person executing a bond with or without a surety or sureties, as the court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond make an order in respect of such offender ordering him to be of good behaviour for any period not exceeding two years and containing any directions to such offender in the nature of conditions referred to in paragraphs (9)(b) and (c) of S.294 which the court shall think fit to give; or

(c) order such offender, if a male to be whipped with not more than ten strokes of a light cane or rattan within the court premises and in the presence, if he desires to be present, of the parent or guardian of such offender[75]; or

(d) deal with such offender in the manner provided by the Juvenile Courts Ordinance 1947

---

[75] Such caning should however be carried out in closed court house, and not in open court, in the presence of the magistrate - Wahab v pp 1964. M.L.J. p.266

The courts frequently deal with young offenders under the Juvenile Courts Act 1947 rather than under S.293 of the C.P.C. The Juvenile Courts Act, S.12 provides for similar orders as those found under S.293 of theC.P.C. and under the Juvenile Courts Act, offenders between the age of 17-21 can be similarly dealt with, wherelse under the C.P.C. the offenders should be below the age of 16 before S.293 can come into play.

S. 173A. Conditional or unconditional discharge

Under this section, the court has power to discharge conditionally or unconditionally any person found guilty of any offence.

S.173A (ii) provides

When any person is charged before the court with an offence punishable by such court, and the court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the court may, without proceeding to record a conviction make an order either -

(a) dismissing the charge or complaint after such admonition or caution to the offender as to the court seems fit; or

(b) discharging the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when

called upon at any time during such period, not exceeding three years as may be specified in the order.

Where a court exercises power under this section, a condition should not be recorded[76].

B. Adult Offenders

S. 294 - This section provides for the release on bond of adult first offenders. S.294 (1) reads

When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any court if it appears to such court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with our without sureties and during such period as the court may direct to appear and receive judgement if and when called upon and in the meantime to keep the peace and be of good behaviour.

---

[76] pp v Tan Eng Hock, 1970 2. M.L.J. p.19
The respondent in this case pleaded guilty to a charge of theft of a motor car. On his plea he was found guilty, convicted and bound over under S.173A of the C.P.C.

On appeal, Justice Abdul Aziz held that an order of binding over under S.173 of the C.P.C. after recording a conviction is illegal and the defect cannot be cured by Section 422.

S. 294 (iii)(iv) and (v) provides the powers of a court in dealing with an offender who has failed to observe any of the conditions of the bond. S. 294A provides for the conditions relating to the bond.

A binding over under this section is not a punishment because this section provides that the court may release an accused person upon a bond "instead of sentencing at once to any punishment". Moreover one of the conditions in the bond is to appear and receive judgement if and when called upon and it would be on this occasion that any punishment would be awarded.[77]

The difference between S. 173A and S. 294 of the C.P.C. was made clear by Thomson J in pp v Idris[78]. The learned judge said

"There are a certain amount of overlapping between the two sections in the sense that very often a case may be appropriately dealt with under either of them. There are, however, certain differences which must be carefully observed. Section 173A is applicable in all cases triable in the Magistrate's Court irrespective of the nature of the prescribed punishment and it is to be observed that where it is proposed to exercise the powers given by it, the court should not proceed to conviction. Section 294 on the other hand, which only applies in the case of adult offenders

---

[77] Public Prosecutor v Ng Tick Chuan 1948-49. M.L.J. Supplement.

[78] 1955. M.L.J. p.234

can only be made use of where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine."

The learned judge then went on to say that it is advisable to make use of S. 294 where "an offence which is generally of a serious nature and which is punishable with imprisonment has been committed by an adult offender and where it is considered desirable to place him on probation. All other cases which are thought to call for unusually lenient treatment can be more appropriately dealt with under the provisions of S. 173A."

Section 294 provides for the binding over of any person "not being a youthful offender", i.e. an adult, section 173A provides for the binding over of youthful offenders. While a youthful offender cannot be bound over under S. 294, an adult offender can, however, be bound over under S. 173A[79].

Fines

Sections 283 and 284 of the C.P.C. provides for matters relating to fines.

S. 283 (i) provides

Where any fine is imposed under the authority of any law for the time being in force then in the absence of any express provision relating to such fine in such law contained, the provisions

---

[79]Tan Eng Hock v pp, 1970. 2 M.L.J. p. 19, the accused, aged 28 was bound over under S. 173A.

following shall apply (that is to say)

(a) where no sum is expressed to which the fine may extent the amount to which the offender is liable is unlimited but shall not be excessive.

(b) in every case of an offence in which the offender is sentenced to pay a fine the court passing the sentence may, in its discretion, do all or any of the following things

(1) allow time for the payment of fine

(2) direct payment of the fine to be made by instalments

(3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender

(4) direct that on default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:

Provided that where time is allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment.

S. 283 (i) (c) provides the scale or period for which the court shall direct the offender to be imprisoned in default of payment of fine.

In cases where there is no express provision relating to the amount of fine under a particular law, the amount to which the offender is liable is unlimited, as is provided in S. 283 (i)(a). But in cases where the maximum amount is provided, 'As a very rough guide in the case of a first offender the fine imposed which be considered as a fair estimate would be 25% of the maximum amount'.[80]

The amount of fine imposed should always be related to the means of the offender. This was said in the case of Tan Kah Eng v pp[81]. The appellant was earning $50 per month as a seamstress and was convicted and sentenced under the Gaming House Ordinance for carrying out a public lottery contrary to the ordinance to a fine of $3,000 or 6 months imprisonment in default. On appeal the judge said that "a fine should be always related to the means of the offender. The imposition of a fine beyond the appellant's means or six months imprisonment in default of payment was tantamount to sentencing the appellant to 6 months imprisonment without the option of the fine.

The courts in Malaysia do not exercise their discretion under S. 283 (i)(b)(3), i.e. issue a warrant for the levy of the amount by distress and sale of any property belonging to the defendant. Courts prefer to exercise their discretion under S. 283(i)(b)(4)

---

[80] Taken from the talk by Mr. Ng Mann Sau, Special President, Kuala Lumpur.

[81] 1965. 2 M.L.J. p. 272

rather than under S. 283(i)(b)(3)[82].

Imprisonment

This is a punishment that is inflicted generally on adult offenders, although there are instances where persons under the age of 21 are sentenced to imprisonment[83]. In Tan Kah Eng's case[84] the accused was only 17 years of age when she was convicted and sentenced to a fine, in default of which she had to undergo imprisonment. The learned judge in this case said,

'It is desirable that so far as possible a young offender under the age of 21 should be kept out of prison unless the offence is so serious that a sentence of imprisonment has to be imposed . . . Before imposing imprisonment on an offender under the age of 21; the court must be of the opinion that no other method of dealing with the offender is appropriate.

Provisions as to the execution of sentences of imprisonment are provided in S. 282 and S. 292 of the Criminal Procedure Code. With regard to sentences of imprisonment, Mr. Ng Mann Sau says this:[85]

---

[82] In Tan Kah Eng v pp, 1965. 2 M.L.J. p. 212 the accused was sentenced to a fine of $3,000 or 6 months imprisonment in default of payment of fine. The accused was only 17 years at the time of commission of the offence.

[83] Adult offender here does not refer to adult offenders as defined in the C.P.C. but a person of and above the age of 21.

[84] 1965. 2. M.L.J. p. 272

"In the case of sentences of imprisonment for the first offender as a rough guide one third of the maximum imprisonment should be considered a fair sentence. No avowal of the so-called 1/3 rule should be made either in open court when sentence is pronounced nor should it be manifest in the grounds of judgement. I should warn that this 1/3 rule has been criticised by Taylor J in the case of Low Oi Jin v R, p. 210 reported in 1949 M.L.J. Supplement and quite rightly too in the particular circumstances of the case.

Whipping

Sections 286, 287 and 288 provides for the place, the time and the mode of executing this punishment. Although the Penal Code and the C.P.C. refers to whipping, in reality the offenders are not whipped, but caned[86].

---

[85]Talk by Mr. Ng Mann Sau, Special President, Kuala Lumpur to the magistrates.

[86]In Singapore the word whipping has been removed from the relevant provisions of the C.P.C. and the word caning was substituted by the C.P.C. Amendment Ordinance No. 18 of 1960.

In Malaysia, the Criminal Justice Ordinance of 1953 abolished whipping with the cat o' nine tails and in its place was substituted the rattan.

The Criminal Procedure Code provides that in the case of adults the rattan used for whipping shall not exceed half an inch in diameter. In the case of youthful offenders, whipping shall not be inflicted in the way of school discipline with a light rattan - S. 288(1)(iii) and (iv).

Whipping as a punishment is not imposed by itself, this punishment generally follows a sentence of imprisonment[87]. In the case of adults, the number of strokes that can be inflicted is twenty four while in the case of a youthful offender the number should not exceed ten strokes[88].

Certain offences in the Penal Code, e.g. theft and housebreaking provides for the additional punishment of whipping. While it is legally within the power of the courts to impose sentences of whipping in cases of theft, and housebreaking, the courts now refrain from doing so. Since the decision of such cases like Loh Mau Sau v pp[89], Ludut v Abu Bakar and Mohammed Ali v pp[90], the sentence of whipping is only imposed in cases where a

---

[87] This is in so far as adults are concerned.

[88] S. 288(1)

[89] 1953. M.L.J.
The accused, a young man of 28, pleaded guilty to the theft of 3 fowls valued at $10/- contrary to section 379 of the Penal Code and was sentenced to 2 years imprisonment and 10 strokes of rattan.

On appeal, the High Court judge said, "As to the sentence of corporal punishment, now the High Court has laid down in a number of cases that while it is legally within the power of the magistrate to impose corporal punishment upon conviction for an offence of this nature, the modern tendency in penal procedure and reform is against the imposition of corporal punishments against adults except in cases involving violence."

[90] Similarly in Mohammed Ali v pp, 1956. 32.M.L.J. the magistrate sentenced the accused, convicted of an offence under S. 380 of the Penal Code to one year's imprisonment and 6 strokes of rattan. The judge in this case said, "There is no question that the sentence of whipping was legal but I consider that except in very bad cases, the punishment of whipping be reserved for cases of violence.

substantial degree of violence has been used. Whipping is now imposed mostly in cases of robbery and rape, and it is not in all cases of rape and robbery that this punishment is meted out - seen in the case of Lim Thian Han v R[91].

The accused in this case was convicted of armed robbery and was sentenced to imprisonment and whipping. On appeal Murray Ausley C.J. said,

"Every robbery armed or otherwise is a very serious offence and must be punished with a long term of imprisonment. In addition the law provides the sentence of whipping may be imposed.

We consider however that such sentence be imposed in cases of certain types. Every case of robbery involves violence to a certain extent. We consider that more than this degree of violence should be present before a sentence of whipping is imposed. We consider that there should be a substantial degree of actual physical violence. The word brutality is not exact but will probably help to explain what we mean. The physical violence used should involve injury which is not merely trivial but a substantial degree of pain."

In Yong Pak Yong v pp[92], however, the High Court considered that although no actual violence is used or brutalityactually shown where violence and brutality are undoubtly involved (such as

---

[91] 1953. M.L.J. p. 213 - Singapore Criminal Appeal

[92] 1959. M.L.J. p. 176, Appeal Judge - Good J.

a secret society demands) the thug who has not had the occasion to implement his threat of violence deserves corporal punishment just as if he has inflicted it.

In this case the appellant was a member of a secret society and was convicted of the offence of extortion and was sentenced by the President to 2 years imprisonment and 8 strokes of rattan. The accused appealed on the ground that he should not be sentenced to corporal punishment because there was no actual violence used by him in the commission of the crime.

Justice Good (as he then was) held on appeal that in dealing with a matter of sentence as distinct from considering whether a person ought to be convicted or not of the offence, the courts are entitled to take judicial notice of what is notorious of what everybody knows: That in cases which although no violence is actually used or brutality actually shown, where violence and brutality are undoubtedly involved (such as secret society demands) the thug who has not had the occasion to implement his threat of violence deserves corporal punishment just as if he has inflicted it.

A reading of the decision of Yong Pak Yong shows just the opposite of what Justice Murray Ausley held in Lim Thian Han's case. According to Yong Pak Yong's case, whipping may be used so long as it is evident that violence is implicit in the particular offence. There is no need for physicial violence or a substantial degree of pain before the court impose a sentence of whipping[93].

However in the recent cases (rape and robbery) we find that whipping is only imposed where a substantial degree of violence has been used in the commission of the crime[94].

Section 389 of the C.P.C. provides that

(a) females

(b) males sentenced to death

(c) males whom the court considers to be more than 50 years of age, are not punishable with whipping.

Death sentence

All persons sentenced to death in Malaysia are hanged.

Suspended sentence

Section 300 of the C.P.C. gives the Ruler of the State power to suspend or remit sentences. This is a clumsy procedure whereby application is made to the Ruler, who will then seek the advice of the convicting judge or magistrate on the question as to whether the application should be granted or refused. Hence the 'suspended

---

[93] Since Lim Thian Han case was decided by the Singapore Criminal Court of Appeal in 1953, we will have to follow the decision of Good J in Yong Pak Yong's case which is a decision of the Ipoh High Court, 1959.

[94] Liew Chiew Sang v pp, Criminal Appeal (Selangor) No. 15 of 1969.

Wong Sai Ngau v pp, Criminal Appeal (Selangor) No. 28 of 1970.

pp v Harcharan Singh, Selangor Criminal Appeal No. 15 of 1969

Mr. Ng Mann Sau, the Special President of the Sessions Court in his talk to the magistrate said that whipping be imposed in cases which involve a substantial degree of violence.

sentence' provided under the C.P.C. is different from the suspended sentence as understood in England and America, in the sense that in Malaysia, application should be made to the Ruler[95].

Commutation of sentence

S. 301 of the C.P.C. gives the Ruler of the State power to commute punishment[96].

---

[95] S. 300(1) of the C.P.C. provides
(1) when any person has been suspended to punishment for an offence the Ruler of the State (acting in accordance with the provisions of Article 42 of the Constitution) in which the offence was committed or in which the conviction was, had may at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
(II) whenever any application is made to a Ruler for the suspension or remission of a sentence the Ruler may require the convicting judge or magistrate to state his opinion as to whether the application should be granted or refused and such judge or magistrate shall state his opinion accordingly.
(III) if any condition on which a sentence has been suspended or emitted is in the opinion of the Ruler by whom it is granted, not fulfilled, the Ruler may cancel such suspension or remission; whereupon the person in whose favour the sentence has been suspended or remitted may if at large, be arrested by any police officer without warrant and remanded by a magistrate to undergo the unexpired portion of the sentence.

[96] The Ruler of the State (acting in accordance with the provisions of Article 42 of the Constitution) in which sentence was committed may, without consent of the person sentenced, commute any one of the following sentence for any other mentioned after it -
(a) death
(b) imprisonment
(c) fine.

CHAPTER V

CONCLUSION AND ASSESSMENT

A. Punishment, the courts emphasis on retribution and deterrence

Our courts in Malaysia place great emphasis on the protection of society and public interest and this factor subordinates all other aims of punishment. In this instance, the policy of our courts in sentencing is the same as was said in the case of R v Abu Bakar[97] twenty two years ago. The court in that case said that in deciding the appropriate sentence, 'a court should always be guided by certain considerations. The first and foremost is public interest. The criminal law is publicly enforced not only with the object of punishing crime but also in the hope of preventing it. A proper sentence when passed serves the public interest in 2 ways. It may deter others who might be tempted to try crimes as seeming to offer easy money on the supposition that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served and best served if the offender is induced from criminal ways to honest living.'

---

[97] 1953. M.L.J. p.56

This policy often leads our courts to impose deterrent sentences in almost all categories of cases that come before them.

While the elements of reform and rehabilitation is seldom considered in the case of adults, it is however the prime consideration in the case of juveniles and young offenders.[98]

In my interview with the magistrates of the lower courts, Encik Sanawi bin Zainuddin and Encik Walter Abraham said that the modern trend in penal philosophy is towards reform and correction[99]. In one case[1], Justice Sharma said,

" . . . It is not merely the correction of the offender which is the prime effect of punishment; the considerations of public interest has also to be borne in mind. . . "

With due respect to the learned judge, and magistrates, I find that reform and rehabilitation is something clearly out of the picture in so far as adult offenders are concerned. The position

---

[98]The general opinion among the sentencers is that adult offenders ought and must have considered the consequences of their acts before they venture to do anything. Madame Harwanth Kaur (during my interview with her) said, "Adults offenders have had the time and experience to learn the requirements of the society and ought to be punished for their deeds."

[99]Magistrates of the Kuala Lumpur Magistrates Court.

[1]Tan Bok Yang v pp, 1972. 1.M.L.J. , p. 214

is unlikely to change in the near future[2].

B. Some suggestions on the forms of punishment and others

(a) Binding over and Discharges

Our courts as I have said before rarely if ever consider the question of reform and rehabilitation in the case of adult offenders and this often leads to very few offenders being discharged conditionally or unconditionally or being bound over. There are in fact many offenders who commit serious crimes but are by nature not criminals; offences like accepting illegal gratification, criminal breach of trust and criminal misappropriation of property and even cases of theft, are sometimes committed during moments of weaknesses. In such cases where the offender has succumbed to temptation, and where the amount of property or the value of it, is not great, it would be appropriate to bind over the offender or to release him on conditional or unconditional discharges rather than imprisoning him.

(b) Fines, Compensation and Restitution

Fines are the most common measures which are frequently imposed by our courts. The various statutes and ordinances, for example, the Essential Power Ordinance, the Minor Offences Ordinance, offences under the Federal Constitution, etc. provide for

---

[2]Our courts may be even more encouraged in persisting the policy of placing greater importance on the needs of the society rather than the welfare of the individual offender after the recommendations of the President of the 9th Commonwealth Magistrates Conference held in Kuala Lumpur from the 10th to the 17 of August,

the imposition of fines for the various offences committed under them. A fine should be imposed in such cases where the statutes and ordinances specifically provide for them, but in cases where crime is an offence against a person or property of a person, it would be more appropriate if the courts instead of fining the accused ordered that compensation be made to the victims under S. 426(b) of the C.P.C. In such cases like theft, housebreaking, breach of trust of the complainant's property, etc., where the victims suffer a loss, it would be more appropriate if the courts by acting under S. 426(b) of C.P.C. compensate the victims for their loss suffered[3].

Restitution is often made to the complainants in cases of breach of trust. In certain cases, courts do order restitution to be made, e.g. in Mahesan v Government of Malaysia, the appellant was ordered to repay the $122,000 which he misappropriated to the Housing Society.

In cases of robbery and other offences where large sums of money or property of great or much value is involved the court

---

[2] 1975, Sir Thomas Skyrome said, "Britain and most Commonwealth countries pay too much attention to reforming the criminals and not enough to protect the community." He went on to say that "Protection of the community should be the overriding considerations" and called for deterrent sentences to be imposed.

[3] S. 456(b) of the C.P.C. provides,
"The court before which a person is convicted of any crime or offence may in its discretion make either or both of the following orders.
(b) an order for the payment of a sum to be fixed by the

should order restitution to be made in cases where the court is of the opinion that the accused is in a position to do so.

(c) Imprisonment

An accused should be sent to prison only as a last resort. The prison sentence should be reserved for those who committed very serious offences like rape and robbery and also for the hard core criminals who will not be deterrent by all other penal measures. This is because of the serious consequences that follow as a result of committing a person to prison. A person convicted and sent to prison will have to bear the stigma all his life. Sometimes, as it is quite usual, the family too will have to bear the stigma of having had one of its members imprisoned. Imprisoning will disrupt the accused person's social and family life, and sometimes it will take a long time before he can readjust himself without feeling alienated. Again, if the accused is the sole breadwinner of the family and there is no other source of income for the family, we will be putting the family to great hardship by depriving the family of a steady income. Again, very rarely if ever are employers willing to give employment to convicted persons and the prisoner on his re-entry into society will become a burden on others for his living.

---

[3] court by way of compensation to any person, or to the representatives of any person injured in respect of his person, character or property by way of crime or offence for which the sentence is passed.

(d) Dismissal from employment

In the early case of Jones v pp, the court considered that it ought not to take into consideration the probability of the accuseds dismissal from employment. But I strongly feel that in the face of the employment and economic situation in our country, this should however, be given much consideration. In the cases involving public servants (e.g. breach of trust, accepting gratifications, committing criminal misappropriation), courts are often bent on imposing deterrent sentences. Usually in such cases, a conviction will result in the accused losing his job (usually, the only means of income they get is from holding that particular post). The fact that he will probably lose his job, plus the fact that he had undergone the trial (i.e. face the publicity) will already be sufficient punishment for the accused and it would be quite unnecessary to impose deterrent sentences just because he is a public servant.

The mere fact that any accused being a public servant will probably lose his job on a conviction is I think a sufficient deterrent to anyone who may be tempted to turn to bad ways to obtain easy money.

(e) Suspended sentences

S. 500 of our C.P.C. provides for suspended sentences. Unlike the suspended sentence which is commonly known in America and Britain, the convicted person in Malaysia, must make an application to the Ruler of the State who would then seek the advice of the convicting magistrate or judge who will then advise the Ruler as to

to whether the application should be granted.

The suspended sentence provided for under S. 300 of the C.P.C. should be replaced with the kind of suspended sentence as commonly known in England and America. By this sentence, a convicted man will receive a sentence of imprisonment which is not immediately carried out, but suspended for a certain period. If during that period, the convicted person does not commit any fresh offence, the sentence of imprisonment will expire. But if he were to commit another offence during that period he will have to serve the suspended sentence and any further punishment that is imposed for the subsequent offence.

On the question of alternative method of sentencing, a magistrate from Ipoh, Mr. Mah Weng Kwai, suggested the setting up of more compulsory attendance centre where persons convicted of certain offences could be made to work instead of being imprisoned[4].

Although the suggestion is good, the main difficulty is the carrying out of the programme.

Are the convicted persons to stay in at the centres during the required period? If that be so, the consequences which follow will be no different from sending the convicted persons to prison. The alternative would, however, be that the convicted person be required to attend these centres during their spare time and

---

[4]Mr. Mah Weng Kwai spoke at the 4th Magistrates Conference held in Kuala Lumpur on the 15th of August, 1975.

possibly during the weekend holidays. This alternative raises the the problem of supervision and control of these persons. All these, however, will incur considerable expenses, i.e. building, or renting the centres, training staffs, etc. and it is unlikely that this method of suggesting will be considered or put into effect in the near future[5].

---

[5]Our courts, as I have said before, are of the view that reform and rehabilitation is not something.

BIBLIOGRAPHY

Books

1. Walker, Nigel - Sentencing in a Rational Society, Penguin 1969.
2. Thomas, D.A. Principles of Sentencing; Heinemann 1970.
3. Professor Ahmad Ibrahim - Malaysian Legal System; Faculty of Economics and Administration, University Malaya.
4. T.J. Newbold, Political and Statistical Account of the British settlement in the Straits of Malacca; London: John Murray, Albermarle Street, 1839.
5. Professor Ahmad Ibrahim, Towards a history of law in Malaysia and Singapore, Braddel Memorial lectures.
6. Joginder Singh Jessey; Malaysia, Singapore and Brunei 1400-1965; Longmans, Malaysia Sdn. Bhd.
7. Hikayat Abdullah, annotation by H.A. Hill.
8. Alice Morse Earle - Curious Punishments of the Past; Herbert and Sons - Caxton Building, Chicago.
9. Frank E. Zimring; Deterrence, University of Chicago Press.
10. Edward Green - Judicial attitudes in sentencing - London Macmillan and Co.
11. Roland Braddel, The law of the Straits Settlement, Volume II, Kelly and Wash Limited Singapore, 1932.
12. Ted Honderich - Punishment, the Supposed Justifications, Hutchinson of London.
13. Frank A. Swettenham - Malay Sketches.